127 (4)

No. 08-1154

In The
Supreme Court of the United States

BRENT DEE JOHNSON,

Petitioner,

vs.

CLARENDON NATIONAL INSURANCE COMPANY,
AMERICAN TRANS-FREIGHT LLC,
ATF TRUCKING, LLC, and ATF LOGISTICS, LLC,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Georgia

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE THE TRUCK SAFETY COALITION, CITIZENS FOR RELIABLE AND SAFE HIGHWAYS FOUNDATION, AND PARENTS AGAINST TIRED TRUCKERS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEFFREY A. BURNS
DOLLAR, BURNS & BECKER, LC
1100 Main Street, Suite 2600
Kansas City, MO 64105
Telephone: 816-876-2600
Facsimile: 816-221-8763
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE

Movant, the Truck Safety Coalition, made timely requests of the named parties hereto for their consent to the filing of its amicus brief in support of the Petition for Writ of Certiorari. Petitioner consents to the filing, but Respondents withheld consent. Accordingly, Movants respectfully move for leave of court to file pursuant to Supreme Court Rule 37.2(b).

The Truck Safety Coalition is a joint operation of the Citizens for Reliable and Safe Highways (CRASH) Foundation and Parents Against Tired Truckers (P.A.T.T.). It is a national organization dedicated to reducing the number of deaths and injuries caused by truck-related crashes, providing compassionate support to truck crash survivors and families of truck crash victims, and educating the public, policy-makers and media about truck safety issues.

The issue in this case is critical to whether trucking companies will be allowed to avoid the leasing and financial responsibility laws and regulations that Congress and the Federal Motor Carrier Safety Administration ("FMCSA") have implemented as part of a national effort to keep the operation of trucking businesses on our highways safe. Movant believes that, if this Court does not grant the pending Petition for Writ of Certiorari and the ruling below is allowed to stand in contravention of established law, the ruling will undercut the fundamental basis upon which motor carrier safety, and therefore, highway safety is based. The issue affects every person who

drives (or who has a loved one who drives) on any of our nation's highways on which interstate commercial trucks travel.

Each year thousands of people are killed in large truck crashes. *See*, FMCSA, Commercial Motor Vehicle Facts, November, 2007. Movant has an interest in arguing for the preservation of uniform application of the laws and regulations establishing accountability of motor carriers as the basis of the federal government's oversight of safety of the trucking industry.

Respectfully submitted,

JEFFREY A. BURNS
DOLLAR, BURNS & BECKER, LC
1100 Main Street, Suite 2600
Kansas City, MO 64105
Telephone: 816-876-2600
Facsimile: 816-221-8763
Counsel for Amicus Curiae

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I. INTEREST OF AMICUS CURIAE[1]

The Truck Safety Coalition[2] is a joint operation of the Citizens for Reliable and Safe Highways (CRASH) Foundation and Parents Against Tired Truckers (P.A.T.T.). It is a national organization dedicated to reducing the number of deaths and injuries caused by truck-related crashes, providing compassionate support to truck crash survivors and families of truck crash victims, and educating the public, policy-makers and media about truck safety issues.

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[1] "Pursuant to Rule 37.6, amicus states that counsel for Petitioner paid the costs of printing this brief because it would have been a financial hardship for amicus to do so. Amicus states, however, that no party to these proceedings had any involvement in authoring this brief, and that the ideas expressed in this brief are solely those of amicus.

The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioner consents to the filing, but Respondents withheld consent.

[2] The address of the Truck Safety Coalition is 2020 14th Street N, Suite 710, Arlington, VA 22201.

decades of established law and will undercut the fundamental basis upon which motor carrier safety, and therefore, highway safety is based. The issue affects every person who drives (or who has a loved one who drives) on any of our nation's highways on which interstate commercial trucks travel.

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II. ARGUMENT

The "Thin Green Line."

This Court should grant review in this case because the ruling below puts in question years of established precedent of other state and federal courts and express statutory and regulatory language, and would undermine the clear framework of accountability that serves as the basis for keeping the operations of interstate motor carriers safe. The history of the applicable caselaw is reflected in Petitioner's Brief and will not be repeated here.

The leasing regulations that were misapplied by the Georgia Court are part of a "thin green line" of financial responsibility that is intended to keep the trucking industry accountable for the crashes they

cause, with the hope that keeping interstate motor carriers financially responsible for business activities will make the trucking industry safer. Because of deregulation of industry entry barriers and effective regulatory control, this thin green line is the difference between a safer, responsible industry and a downward spiral that would allow the most unscrupulous motor carriers to set the industry standards.

The policy framework established by Congress and the FMCSA rests on three legs: first, motor carriers' "leases" were restricted so motor carriers cannot contract away responsibility for crashes involving their loads. *See*, 49 C.F.R. §376.12(c)(1) (the authorized carrier lessee shall have exclusive possession, control and use of the equipment for the duration of the lease). Second, financial responsibility rules were adopted that provide that every motor carrier shall maintain financial responsibility (insurance or surety) of a minimum amount of insurance. *See,* 49 U.S.C. §31139, Minimum Financial Responsibility for Transporting Property. Third, requirements were imposed on insurance companies to include specific endorsement language for truck insurance policies that eliminates potential loopholes that insurors could otherwise put in policies to avoid coverage such as restrictions of coverage to certain listed or "described" vehicles, or other policy conditions or limitations on the coverage. *See*, 49 C.F.R. §387.15, Illustration 1 (MCS-90 endorsement).

The importance of this accountability has increased as the industry has been deregulated. Since

the early days of the trucking industry, Congress has acknowledged the need to provide protection to the motoring public from the dangers that are inherent when an industry is allowed to use our public highways for commercial purposes. When the Motor Carrier Act of 1935 was enacted, Pub. L. No. 74-255, 49 Stat. 543 (1935), codified at former 49 U.S.C. §301, et seq., the Interstate Commerce Commission ("ICC") was given the responsibility of regulating the industry, including the determination of whether specific carriers were "fit, willing and able to perform the service proposed and to conform to the provisions of this part. . . ." *See,* former 49 U.S.C. §307(a). Section 216(a) of the Act provided the affirmative duty that the carriers "provide safe and adequate service, equipment and facilities." Former 49 U.S.C. §316(a) (*now see,* 49 U.S.C. §14101(a)). Under these provisions, businesses seeking motor carrier status had to make an initial showing of an ability to operate safely in order to obtain motor carrier authority for a particular route. In 1966, the Department of Transportation ("DOT") was established, and the ICC's principal safety responsibilities concerning motor carriers were shifted to the DOT. Pub. L. No. 89-670 §6, 80 Stat. 931, 937 (1966); *see,* former 49 U.S.C. §1655[3].

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[3] An overview of the history of the above statutory background relating to motor carriers can be found at William E. Kenworthy, *Transportation Safety and Insurance Law*, Chapter 4 (Lexis Nexis 2004).

By 1980, the regulatory barriers to entry into the trucking industry were seen as too restrictive, and deregulation of the industry began. The Motor Carrier Act of 1980 attempted to balance the need for removal of restrictive barriers to entry into the industry against protection of the motoring public. The trade-off was that the law would remove the bottleneck of the regulatory process for new industry entrants, but every motor carrier would be required to obtain significant minimum liability insurance. The thought was that the underwriters at insurance companies would not provide significant insurance coverage without taking steps to require safe operators, even in the face of the increased competition that would result from deregulation:

> To protect against any potential impairment to safety, arguments were made that some precautions should be taken to require higher financial responsibilities for motor carriers. . . . Thus, the action of the Committee in increasing financial responsibility is to encourage carriers to engage in practices and procedures that will enhance the safety of their equipment so as to offer the best protection to the public.
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> The carrier who wants to maintain high safety levels will be under pressure to cut his costs to meet his competitors, some of which may cut costs by operating in violation of minimum safety standards. Specifying minimum insurance levels is one way to help

> improve motor carrier safety. Insurance companies are equipped to evaluate the performance of the motor carriers. The premiums they assess are in direct relation to the risks they assume. Therefore, an unsafe carrier will have an increased premium and a totally unsafe carrier may not be able to obtain the insurance necessary to operate, or at best will be at an insurance cost disadvantage.

House Report No. 96-1069, Motor Carrier Act of 1980, P.L. 96-296, pages 42-43.

Congress had already passed a statute that established that a motor carrier may be required to be responsible for the operation of leased equipment. 49 U.S.C. §11107 (now codified at 49 U.S.C. §14102) provided that, as to such leased equipment, a motor carrier may be required to:

> (4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary on safety operations and equipment. . . .

This legislation enabled the federal trucking regulators to follow Congress' intent to promote safety and implement 49 C.F.R. §1057 (now 49 C.F.R. §376.12(c)(1)) which provides in part for the motor carrier's exclusive possession and responsibility for operation of equipment:

> The lease shall provide that the authorized carrier lessee shall have exclusive possession, control and use of the equipment for the

> duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation to the equipment for the duration of the lease.

The leasing requirements also require that the motor carrier maintain the required liability insurance "for the protection of the public. . . ." 49 C.F.R. §376.12(j).

The final leg in this safety/financial responsibility framework is the MCS-90 endorsement. 49 C.F.R. §387.15 requires that an insurance policy that is used to satisfy the financial responsibility laws cited above must contain an endorsement that includes language that the policy shall provide coverage and that "no condition, provision, stipulation or limitation contained in the policy . . . or violation thereof shall relieve the [insurance] company from liability or from the payment of any final judgment, within the limits of liability herein described. . . ." This means the fact that a vehicle is not a listed vehicle, or is owned by another person, shall not keep the policy from providing coverage for a load arranged for by the motor carrier.

The intent of Congress is clearly to promote safety by requiring the authorized motor carrier to bear the risk of loss caused by its business. Motor carriers cannot be allowed to circumvent these requirements by dealing with non-compliant drivers and owner-operators, and then claim they have no liability for acts of such "independent" operators.

The statutory and regulatory framework, both before and after route and entry deregulation in the 1980's was designed to promote highway safety and to provide a financially responsible party to stand behind *any* scheme that trucking companies or insurers could invent to try to circumvent the laws that promote safe operation. The idea is that, if a trucking company has to get decent insurance to answer for losses caused by its business, at least the underwriters at the insurance company will take a hard look at the practices of the company and make coverage and premium decisions accordingly. Unsafe companies, essentially, will be forced out of operation.

This framework will not perform as intended if the first leg is taken away. If a company can thwart the will of Congress by devising a creative scheme to attempt to shift the risk of loss of a part of its operation to insolvent or poorly insured contractors, not only will public safety be negatively affected, legitimate operations will be put at a competitive disadvantage, creating a downward spiral of cutting costs by sacrificing safety. The congressional and regulatory measures that require a motor carrier to obtain significant insurance and that eliminate insurance loopholes that could otherwise defeat coverage are meaningless if a motor carrier can avoid those requirements by simply having an unwritten agreement with a non-compliant trucker to handle part of the motor carrier's business and thereby escape the "complete responsibility" provision of the leasing regulation.

CONCLUSION

The decision below allows fly-by-night dealing that undermines the federal motor carrier safety framework by allowing interstate motor carriers to contract with dangerous trucking companies to handle their loads, or portions of their loads and to escape financial responsibility for that part of their business. This is contrary to congressional and regulatory intent and throws decades of established caselaw into question. If this is allowed to stand, it will reward unsafe cheaters and punish law abiding safe companies that compete with them. The result will be fewer safe trucks and more deaths on our highways. This Court should grant the Writ and provide the review that will keep application of the federal motor carrier safety laws and rules uniform and safe. Without the "thin green line" of financial accountability, there is nothing separating the innocent motoring public from dangerous and unscrupulous trucking companies willing to cut corners and operate unsafely.

Respectfully submitted,

JEFFREY A. BURNS
DOLLAR, BURNS & BECKER, LC
1100 Main Street, Suite 2600
Kansas City, MO 64105
Telephone: 816-876-2600
Facsimile: 816-221-8763
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